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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 593

FRANCES KAHN,

Petitioner;

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

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October Term, 1966

No. ——

FRANCES KAHN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this cause on July 18th, 1966.

Opinions Below

The opinion of the Court of Appeals, Second Circuit, is not reported to date, and is printed as Appendix A, *infra.*

The opinion of the Trial Court (McLean, *J.*) denying petitioner's pre-trial motion to suppress eavesdrop recordings by federal officers of conversations between petitioner-attorney and her client in the Westchester County Jail was denied, and is reported at 251 F. Supp. 702 (SDNY 1966), and is printed in the Supplemental Appendix of petitioner which accompanied petitioner's brief before the Court of Appeals for the Second Circuit. The said opinion denying

petitioner's motion to suppress the eavesdrop recordings is also printed in co-petitioner Pacelli's petition for certiorari as "Appendix C", Docket Number 557, October Term, 1966. An opinion on petitioner's pre-trial motions is printed in petitioner's Supplemental Appendix to the Court of Appeals (Tyler, *J.*).

Jurisdiction

The judgment of the Court of Appeals (Appendix B, *infra*) was entered on July 18th, 1966. A timely Petition for Rehearing *En Banc* (Appendix C, *infra*) was denied on August 26th, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether eavesdrop evidence obtained by the Government which was used to make its case, by means of surreptitiously and deceptively utilizing an informer in the guise of a client during petitioner's attorney-client conferences in the counsel room of the Westchester County Jail, so violates petitioner's rights under the Fourth, Fifth, Sixth and Ninth Amendments?

2. Whether the Government's intrusion in their attorney-client conferences prior to arrest, and the client was the Government's principal witness, and the use of his testimony thus obtained, constitutes a violation of the Fourth, Fifth, Sixth and Ninth Amendments to the Constitution of the United States?

3. Whether *Olmstead* v. *United States,* 277 U. S. 455, *On Lee* v. *United States,* 343 U. S. 747, *Lopez* v. *United States,* 373 U. S. 427, and *Lanza* v. *New York,* 370 U. S. 139, should

now be overruled or should this Court alternatively exercise its supervisory powers over criminal justice?

4. Whether a conviction can be sustained where the most telling evidence against the petitioner consisted of the recording of her conversation with an informer, not known by the petitioner to be such, which was obtained by means of a device concealed on the client-informer, who was sent with such equipment to the counsel room by the United States in order to record his conversations with the petitioner?

5. Whether obtaining the recording of a conversation by a concealed device carried on the person without the knowledge of the individual to whom the carrier of the device is talking constitutes an unreasonable search and seizure in violation of the Fourth Amendment and in violation of petitioner's rights under the Fifth, Sixth and Ninth Amendments?

6. Was petitioner deprived of a fair trial in violation of the Fifth Amendment when the Trial Court allowed the Government's key witness-client to testify against petitioner-attorney and then permitted the Government witness-client to claim Fifth Amendment privilege against self-incrimination simultaneously sealing the lips of petitioner-attorney and curtailing her direct testimony, thereby precluding petitioner from adequately presenting her defense?

7. Was petitioner deprived of a fair trial by action of Government prosecutor in itemizing and unduly emphasizing Jencks Act material in presence of jury over petitioner's objection, knowing it would not be admissible in evidence and then alluded that he had other evidence in his closing argument to the jury?

8. Whether a trial conducted, wherein the identical evidence presented to the jury on the substantive counts as the conspiracy, which charges contained in the substantive counts resulted in an acquittal and dismissal, is a violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States under the doctrine of *Paar* v. *United States,* 363 U. S. 370 (1960)?

a) The verdict of the jury acquitting petitioner of the substantive counts was inconsistent with the jury's verdict of guilty on the sole conspiracy count;

b) The conviction of petitioner charged with substantive offenses and one count of conspiracy may not be sustained on the theory of conspiracy when the substantive offenses fell due to an acquittal and dismissal.

9. Whether petitioner was deprived of a fair trial by reason of the following and may such conviction be permitted to stand in light of this Court's power of supervision over criminal justice in federal Courts where the following occurred?

a) Such electronic surveillance of petitioner-attorney and her informer-client, through the instigation of the prosecution, with their participation and concurrence, was an intrusion upon the attorney-client relationship, if not the privilege itself;

b) Such surveillance, intrusion, observation, reporting and recordings of the attorney-client conferences violated petitioner's rights under the Fourth, Fifth, Sixth and Ninth Amendments;

c) The client-informer testified he practiced a deception upon petitioner, with the connivance of the

Government, by giving petitioner spurious legal services to be rendered;

d) After the client-informer continuously requested petitioner to perform legal services in his behalf thereby compelling petitioner to return to the Westchester County Jail again and again, the prosecution emphasized the numerous visits of petitioner to the jail *pro tanto* during the entire trial;

e) The client-informer was allowed to invoke the Fifth Amendment to crimes, one of which was beyond the statute of limitations, and when petitioner sought to explain her many visits to the client at the jail she was stopped from doing so when the Trial Court ruled that petitioner's lips were to be sealed due to her client's invocation of the self-incrimination privilege;

f) The prosecution alluded to other evidence, not in evidence, in his closing argument to the jury;

g) The Trial Court omitted a necessary element, to wit: subornation of perjury, in the Court's charge to the jury. The Government failed to prove a conspiracy to violate the Obstruction of Justice *and* Subornation of Perjury statutes (Title 18, §§1503 and 1622, U. S. C.);

h) Petitioner was erroneously denied a change of venue by the District Court (Tyler, *J.*) as is evident from the Court's opinion, unreported, but printed in petitioner's Supplemental Appendix for the Court of Appeals, p. S17a at S22a thereof;

i) Petitioner was erroneously denied a severance of trial by District Judge Tyler on the pre-trial motions since petitioner desired to call co-petitioner to testify so as to obtain exculpatory evidence in her behalf;

j) Petitioner was prejudiced by the pre-arrest delay and in effect, a speedy trial. *Cf.* Appendices H and I hereto, *infra.*

Constitutional Provisions Involved

The constitutional provisions involved are the Fourth, Fifth, Sixth and Ninth Amendments to the Constitution of the United States, are printed herein and set forth as Appendix D hereto, *infra.*

Statutes Involved

The statutes involved herein are set forth in Appendix E hereto, *infra.*

Statement

The indictment (11a),* filed November 8, 1965 (1a), named Vincent Pacelli and Israel Schawartzberg as defendants, in addition to petitioner, an attorney. Count One charged a conspiracy to violate §§ 1503 (obstruction of justice) and 1622 (subornation of perjury) of Title 18, U. S. C., from May 1, 1962 to the date of the filing of the indictment, by influencing etc. one Charles Hedges, "who was a witness to be called before a United States Grand Jury and the United States District Court for the Southern District of New York in a proceeding and investigation into the alleged narcotic activities of Vincent Pacelli and others," by procuring Charles Hedges to commit perjury "in the aforesaid proceeding and investigation," and by

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* Numerals in parentheses followed by letter "a" refers to Appellants' Joint Appendix.

influencing, obstructing etc. and endeavoring to influence, obstruct etc. "the due administration of justice in the aforesaid proceeding and investigation." Each of the five overt acts charged in the conspiracy count corresponded specifically to one or another of the respective charges in the substantive counts.

Count Two was dismissed by the Trial Court. Count Two had charged that on or about June 30, 1962 (changed by the Supplemental Bill of Particulars to read July 30, 1962—R. 184)[1] the co-petitioner Schawartzberg endeavored to influence etc. the same Charles Hedges, "who was a witness to be called," etc., i.e., in the same wording as above noted in the conspiracy count, in violation of 18 U. S. C. § 1503.

Count Three charged co-petitioner Schawartzberg alone with obstruction of justice on or about June 30, 1962 (changed to July 30, 1962—as in Count Two), "in that" Schawartzberg endeavored to "alter, suppress and nullify" the testimony of Charles Hedges, "who was a witness to be called," as recited in the two preceding counts. The Jury acquitted Schawartzberg on Count Three (705a). As will appear, the Government's explanation (accepted by the Trial Court) of the seemingly substantial identity between Counts Two and Three was that under Count Three the Government did not have to prove that Charles Hedges at the time in question was "a witness to be called" before an actually impanelled Grand Jury conducting the narcotics investigation referred to.

Count Four, which was dismissed by the Court, charged co-petitioners Pacelli and Schawartzberg in the same words as Count Two, except for the date of the alleged offense, which was stated in this instance as January 9, 1963.

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[1] Papers not included in Appellants' Joint Appendix will be cited under the designation "R" as pages numbers of the Record on Appeal as docketed in the Court of Appeals, Second Circuit.

Count Five charged Pacelli and Schawartzberg, in language similar to that which charged Schawartzberg alone in Count Three, with the offense of obstruction of justice relating to Charles Hedges as having been committed on or about January 9, 1963. The Jury convicted Pacelli but acquitted Schawartzberg on Count Five (706a).

Counts Six and Seven were the substantive counts naming petitioner Kahn alone, and the Jury acquitted her on both of those counts (706a). Count Six is similar to Counts Two and Four, in that it was deemed by the Trial Court to require proof of Charles Hedges being a witness before an actually impanelled and functioning Grand Jury; Count Seven was deemed by the Trial Court similar to Counts Three and Five, i.e., as not requiring proof that Charles Hedges was actually a witness before a Grand Jury. The reason why the Trial Court allowed Count Six (and not only Count Seven) to go to the Jury was that it deemed that as to Count Six the Government had *prima facie* proved the element of Charles Hedges' being a Grand Jury witness, although not during the entire time mentioned in Count Six, which was from on or about January 16, 1963 to on or about September 27, 1964—the Trial Court instructed the jury that they could consider the case against petitioner under Count Six only with respect to the period from June to September 1964, when the Grand Jury witness element was apparently deemed by the Court to have been adequately shown by the Government. Count Seven covered the same time period as Count Six (January 16, 1963 to September 27, 1964), but again, the Trial Court did not deem Count Seven to require proof of the Grand Jury witness element, and accordingly Count Seven was submitted to the Jury without the time-restriction which the Court imposed as to Count Six. In any event, as above-mentioned, the Jury acquitted petitioner on both of these

substantive counts (Six and Seven), and she stands convicted in this case on the Conspiracy Count (Count One).

To recapitulate, the Conspiracy Count (Count One) charged both conspiracy to obstruct justice and conspiracy to suborn perjury. None of the substantive counts charged subornation of perjury. One substantive count for obstruction of justice naming Schawartzberg alone (Count Two), and one naming Schawartzberg and Pacelli (Count Four) were dismissed by the Trial Court because at the times involved Charles Hedges was not yet a Grand Jury witness. On another obstruction count (substantive) charging Schawartzberg alone (Count Three) the Jury acquitted. On another such count charging Schawartzberg and Pacelli (Count Five) the Jury acquitted Schawartzberg and convicted Pacelli. These latter two counts (Three and Five) were allowed to go to the Jury because the Trial Court deemed them not to require proof of Charles Hedges' being a Grand Jury witness. (In effect, then, the Trial Court was allowing these latter counts to go to the Jury on proof of Narcotics Bureau investigative activity as such, without requiring proof of judicial investigation or other judicial proceedings.) The two substantive counts charging obstruction of justice by petitioner (Counts Six and Seven), on both of which she was acquitted, were allowed to go to the Jury because under Count Six the Court deemed there was proof of Charles Hedges' being a Grand Jury witness during a portion of the time period involved in that count, and because under Count Seven the Court deemed that the Grand Jury witness element need not be proved. We would now add also that since Schawartzberg's role in this case was portrayed by the Government as having been that of Miss Kahn's law office employee and agent, the acquittal of both Schawartzberg and petitioner on all of the substantive counts submitted to the Jury, taken together with the fact previously mentioned that all of the overt acts in

the conspiracy count derive from and correspond specifically to the respective subject matters of one or another of the substantive counts, involving Schawartzberg or petitioner, a close examination is required to see whether the verdict was inconsistent.

The constitutional issues as to the extraordinary way in which the Government "made its case" against petitioner Frances Kahn, i.e., by procuring Charles Hedges to feign a confidential relationship of attorney-and-client with petitioner Kahn during conferences in prison counsel room visiting premises under electronic surveillance by Government agents.

Throughout the conferences between Hedges and petitioner which are claimed by the Government to have produced the allegedly illegal offers or requests by petitioner involved in the present indictment, Hedges was admittedly acting as a Government operative. These conferences, all of which occurred at the Westchester County Jail under circumstances in which petitioner believed that she and Hedges were conferring in the attorney-client relationship, were subjected to electronic surveillance on certain specific admitted occasions, and to additional electronic surveillance of undetermined extent.[2] Although no taped evidence was introduced in this trial as to any such electronic recordings, the fruits thereof were used against petitioner. We urge as a prime issue in this petition, that the indictment against petitioner must be dismissed on fundamental constitutional grounds by reason of the Government's extraordinary conduct in thus having invaded the attorney-client status, and in having perverted

[2] The eavesdropping at the Jail, and the conduct of the Government's scheme as a whole for using Hedges to spy on petitioner, are well described in Judge McLean's opinion of February 21, 1966, printed in our Supplemental Appendix and in co-petitioner Pacelli's Appendix C, Docket No. 557, and in *United States* v. *Kahn*, 251 F. Supp. 702.

that constitutionally important status by stealthy and deceitful methods for the express purpose of invading petitioner's own constitutionally protected right of privacy and freedom from self incrimination. We are respectfully advancing these constitutional contentions in this petition for certiorari notwithstanding that the electronically obtained "evidence" was not directly used in this trial. Our focus, then, in urging these constitutional contentions, is not merely upon the fact that the Government electronically eavesdropped conversations between an attorney and client in prison premises reserved for confidential professional discussions, but, more important, our focus is upon the Government's having procured the client to entice the attorney into alleged commission of crime.

Reasons for Granting the Writ

Because the extraordinary conduct, indeed the probably unique conduct, of the Government's officials in the "making" of this case and in the obtaining of the indictment, i.e., their procuring Hedges to spy on his own lawyer during professional jail visits and to discuss with the attorney alleged proposals to obstruct justice (plus obtaining Hedges' "consent" to electronic eavesdropping), is so offensive to due process and so subversive of the attorney-client relationship as to justify this Court in exercising its supervisory power over the decent administration of federal criminal Justice.

The outrageous nature of the unconstitutional misconduct of the Government's officers calls not only for individual redress on behalf of petitioner, but equally and even more it calls for exemplary corrective action in the public interest. If this indictment and this conviction are not nullified, neither the practice of law by the profession

nor the obtaining of effective legal services by the people will ever again be safe in this country from the zeal of a prosecutive officialdom playing upon the susceptibilities of incarcerated persons or of persons who fear criminal prosecution.

The unconstitutional vice of the Government's conduct in this case should be discerned as residing not primarily in the secret electronic surveillance of the appellant's professional consultations with her client in prison premises ostensibly reserved for such confidential meetings, but in the fact that the Government actually procured the client not only to spy upon the attorney but to engage in alleged criminal discussions so as to entice and even to provoke the attorney into alleged crime under the deceit and guise that the participants were continuing to deal with each other as client and attorney.

In any event, the electronic surveillance done here does not have the assured constitutionally tolerated status which the courts below assumed because this Court has but recently undertaken to review this type of privacy-intrusions.

We respectfully believe there are supremely important constitutional problems which this case presents under the Fourth, Fifth, Sixth and Ninth Amendments. At the same time, we would preliminarily state also that our commencement of this argument with a constitutional "plea in bar" as it were, is done with some diffidence since petitioner is a member of the Bar of this Court, accused of serious crime importing possibly fatal unprofessionality. We therefore hasten to add that in thus giving primacy to our constitutional contentions in this petition, we are surely not suggesting that the petitioner's case lacks just merit on the facts. On the contrary, the very pattern of the strangely mixed jury verdict of acquittal on the sub-

stantive counts and conviction on the conspiracy count, heartens petitioner in her expectations that certiorari may be granted and it may conclude that this conviction is factually, and not only legally, wrong.

The essential facts on which we urge the constitutional contentions require no lengthy repetition. The Federal Narcotics Bureau began, in the year 1961 or 1962, its efforts to deal unilaterally with Charles Hedges behind the back of his attorney, petitioner Kahn. Nor was it long in this process before the design was under way to make the attorney's back not only a screen but a target. Hedges was metamorphosed by his jailers from client to secret police operative. With admittedly impressive success—for in Charles Hedges the Government had a past master of guile—the treachery was kept concealed from the victim attorney. Under the plenary "administrative" control of his Narcotics Bureau overseers, Hedges puppeted exactly what was wanted of him. He continued, with perfection throughout, the pose of "client", while actually functioning as a secret policeman against his own attorney. He "consented" to the installation of electronic eavesdrop devices which would audit his conversations with petitioner at the prison.[3] But above all, we again emphasize, Hedges let himself be used by the Narcotics Agents to try to betray his attorney by lulling her in the belief that she and Hedges were functioning solely in the relationship of attorney and client. The situation which prompted Mr. Chief Justice Warren in *Spano* v. *New York*, 360 U. S. 315, to refer to John Gay's couplet

"An open foe may prove a curse
But a pretended friend is worse."

[3] See the hearings in the Trial Court on the motion to suppress the electronic eavesdrops, paged in the Supplemental Record on Appeal as pp. 1-371a, these being also the numbers in the pagination of the original minutes. See also the next footnote herein.

was as a Sunday School picnic compared to the Governmental breach of the constitutional decencies which has happened in this case.

Petitioner moved unavailingly before trial for inspection of the Grand Jury minutes and for dismissal of the indictment on constitutional grounds substantially similar to those which we here urge. See her Notice of Motion dated November 16, 1965 (pp. 11-20 of the Record on Appeal).[4]

We realize the force of the prevailing convention in the Federal Courts against the granting both of motions to inspect Grand Jury minutes and of motions to dismiss indictments on the ground of reception of unconstitutional evidence by the Grand Jury. However, in the extraordinary circumstances of this case there should have been, at the very least, an inspection of the Grand Jury minutes to determine whether the peculiarly odious electronic eavesdropping resorted to in this case had resulted in any evidence submitted to the Grand Jury. More fundamentally, however, there should have been an inspection of the Grand Jury minutes as a deliberate judicial means of paving the way for an undoing of the indictment obtained as the result of the constitutionally perverted police methods used to "make this case".

The Federal Courts had several times held that an indictment is dismissible on the ground that it was based solely upon evidence procured in violation of the accused's constitutional rights—which is the situation that we claim is presented here, since all indications are that the case against petitioner was made solely on the strength of the deceptive and enticing activities of Hedges acting upon

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[4] The motion for suppression of the eavesdrop evidence was denied. See the last preceding footnote, and Judge McLean's opinion dated February 21, 1966 (printed in our Supplemental Appendix in the Court below, *United States* v. *Kahn* (SDNY 1966), 251 F. Supp. 702).

the Government's instructions. The constitutional theme just mentioned is stated in the following quotation from the *Annotation* entitled *"Competency Or Sufficiency Of Evidence Before Grand Jury As Affecting Validity Of Indictment Or Conviction In Federal Court,"* 100 L. Ed. 404, at 407-408.

It is hardly necessary to cite authority for the proposition that this Court, in appropriate cases, enforces upon both the Federal and state policemen of this country the fundamental standards of decency and civilized conduct for which our society and our system of government stand. E.g., *Rochin* v. *California,* 342 U. S. 165; *Mesarosh* v. *United States,* 352 U. S. 1.

In enforcing these standards in Federal criminal prosecutions particularly, this Court exercises that familiar, potent, residual monitoring and sanitizing authority known as the supervisory power over the administration of Federal criminal justice. *McNabb* v. *United States,* 318 U. S. 332, 341; *Marshall* v. *United States,* 360 U. S. 310.

In considering the proper procedural course which this Court may see fit to take in the event it determines that we have in truth suffered constitutional injustice which needs to be redressed, the Court will take into account, we of course realize, that electronic eavesdrop evidence was not introduced in this trial—hence the case is not technically one involving problems of "suppression of evidence" as such at the trial level. However, a reading of Judge McLean's opinion in this case denying our motion to suppress,[5] makes it rather clear, we think, that the Judge, in his whole approach to this branch of the case, was decisively influenced by the fact that this Court had theretofore refused to disapprove on constitutional grounds electronic

[5] See *United States* v. *Kahn* (SDNY 1966), 251 F. Supp. 702.

eavesdropping of the type here involved where one of the parties to the eavesdropped conversations has "consented" thereto. Judge McLean cited the familiar Supreme Court case, e.g., *On Lee* v. *United States,* 343 U. S. 747; *Lopez* v. *United States,* 373 U. S. 427. However, about three weeks before Judge McLean rendered the opinion referred to, this Court had granted certiorari in *Osborn* v. *United States,* 382 U. S. 1023, 86 S. Ct. 644, 15 L. Ed. 2d 538, to review the constitutionality of this very type of "consented to" electronic eavesdropping. To be sure, *On Lee* and *Lopez* remain the law in the meantime. But we respectfully request this Court, in making its overall evaluation of the constitutional aspects of our case, to take into account that the electronic eavesdropping which the Government here carried out with Hedges' consent at the Westchester County Jail may no longer be assumed with absolute confidence to have been constitutional as an "open and shut" matter.

In this newly dubious light in which such electronic eavesdropping must now necessarily be regarded since the granting of certiorari in the *Osborn* case, the entirety of the Government's conduct in our situation comes in for stricter scrutiny, we submit.

In any event, as we have above suggested, the ultimate constitutional focus in our case, as regards the question of the constitutionality of the Government's conduct, should be on the way in which the Government used Charles Hedges—irrespective of the factor of electronic eavesdrops. This ultimate constitutional focus reveals a horrendous violation of due process of law, repellently further tainted moreover by a perhaps even more frightening subversion of the great Anglo-American institution known as the attorney-client relationship.

Petitioner has been the victim of an all but incredible violation of her rights of due process of law, through having had secretly thrust upon her by the Federal Narcotics Bureau a lethal instrumentality under the form and guise of a trusted "client". One hardly knows where to begin to catalogue the incidents of constitutional offensiveness which have here taken place. Shall one list first the sheer element of indecency and treachery resorted to by Federal government officials? Or shall one list first the constitutionally blind misuse of the attorney-client aspect? Or the use of supposedly constitutionally sheltered official governmental premises as the scene for the plan? Or the conscioncelessness of the official abuse of the prisoner-status of Hedges himself? Perhaps our own choice for first place in this catalogue of unconstitutionalism[6] would be the emphasis upon the literally terrible undermining of confidence as between attorneys and clients which must henceforth spread like a poison if not like a rampant plague unless this Court scotches the evil by granting the petition for certiorari.

We do not think that any extended argument is needed to demonstrate that the pattern of the Jury verdicts as to the three defendants and as to the several counts raises very disturbing questions as to the rationality and the justice of the conviction of petitioner on the conspiracy count alone. We know that the Federal decisions speak a virtual refrain of the theme that verdicts under multiple count indictments need not be consistent; and that some

[6] This Court's own first choice might well be that the Government's officers with full knowledge of Hedges' recantation to them of his claims of innocence in the Connecticut trial (a knowledge which petitioner did not share), let Hedges go *before the Court below* in 1963 to continue his former protestations of innocence, in the appeal from Hedges' Connecticut conviction (*United States* v. *Cianchetti*, 315 F. 2d 584 (C. A. 2 1963)). The Government thus apparently connived with Charles Hedges to deceive not only petitioner, but *even the Court below*.

of the cases even say such verdicts need not be rationally consistent, or that a verdict of conviction under a particular count need not be rational in relation to the verdicts on other counts. We also know that this principle is especially steadfast when inconsistency is sought to be urged as between conspiracy and substantive counts.

However, before going into the brief recitals which we desire to make concerning the relationship of the charges, proofs and verdicts under the respective counts of the within indictment, we call attention to the fact that the rigid Federal rule above mentioned has from time to time produced judicial expressions denoting less than an entire satisfaction with the rule; and we think we can show that appellate dissatisfaction with the rule would be very strongly justified indeed on the facts of our case. See, for example, *United States* v. *Maybury,* 274 F. 2d 899 (C. A. 2 1960), declining to apply the rule in a non-jury case. See also *Parr* v. *United States,* 363 U. S. 370, 393-394, where the Supreme Court disapproved a conspiracy conviction on the ground that, on the facts presented, a substantive count whose violation was the subject matter of the conspiracy count could not be sustained. There have been expressions in other cases denoting a less than absolute commitment to the rule. E.g., *United States* v. *Albers,* 115 F. 2d 833 (C. C. A. 2 1941), declaring that the verdict was "not *so inconsistent* as to require that it be set aside"; *Apodaca* v. *United States,* 188 F. 2d 932 (C. A. 10 1951), remarking that consistency in a verdict is not "an *invariable* exaction of the law"; *United States* v. *Moloney,* 200 F. 2d 344 (C. A. 7 1953), stating that "*generally*" the verdict need not be consistent; *Heflin* v. *United States,* 132 F. 2d 907 (C. C. A. 5 1943) holding that the verdict did not give rise to "*fatal* inconsistency". And see especially *United States* v. *Wilson,* 342 F. 2d 43 (C. A. 2 1965), stating that the

verdict "was not *wholly irreconcilable* with *any* rational theory". (Emphasis supplied.)

We submit that the verdict of conviction of petitioner under the conspiracy count is "wholly irreconcilable with any rational theory". We do not expect the Government to dispute—and if we are wrong in this we await with interest the Government's reasons for so disputing—that with a single possible exception to be mentioned in a moment, every single item of charge or *probatum* which might avail to sustain the conspiracy conviction of petitioner was adjudicated in her favor by the Jury when they acquitted her under the substantive counts (Counts Six and Seven). The single exception just alluded to would be with respect to the item of subornation of perjury in the conspiracy count, which is not charged in any of the substantive counts, all of which charge obstruction of justice.

We believe the Government will not dispute that the only item in the trial proofs on which any charge of subornation of perjury by any defendant might hinge is the alleged suggestions by petitioner to Hedges that he should push back certain dates to defeat the Government *via* the statute of limitations. We think we have shown in our Statement that, probatively, this item in the Government's case is very thin at best and would form a slender reed on which alone to sustain the conspiracy conviction. Furthermore, under the wording of Count Seven, one of the substantive counts on which petitioner was acquitted, the Jury must have had to pass upon this very item in the proofs, because Count Seven speaks of an "endeavor to alter", etc., the testimony of Hedges.

We think that the only *logically* sound argument that the Government could make in reply to our last suggestion (that the Jury must have considered the "statute of limitations" push-back item under Count Seven), would be an

answer which as a *legal* matter would place the Government in a self-defeating position. This answer would be that the Jury may well not have considered the item under Count Seven, because the Jury were given no adequate instructions by the Court to guide them in interpreting either the "alter" language of Count Seven or the "subornation" language of Count One. And this last is indeed the fact. It is a remarkable thing, throughout this trial record, including the instructions to the Jury, that no one perceived the importance or the possible importance (as matters turned out) of the subornation problem.

And once we do address our attention to this subornation problem in the instant case, we see that substantial attention had to be (but was not) given to it. What, for example, of the question of whether petitioner, in her alleged attempt to suborn Hedges to push back the Aspelund dates, was in fact trying to suborn a *perjurious* statement? Is it to be simply taken for granted, in so grave and dire a human situation as a prosecution for crime, that the Government's charge that what petitioner allegedly wanted Hedges to do was false, is somehow self-evident or *ipso facto* proven? The Government's single apparent effort at coping with this problem, namely, the reading into the record of the few lines of Aspelund's Connecticut trial testimony, did not reach the issue which we are here posing. That fragment of Aspelund's testimony was expressly given to the Jury by the Court under the admonition that it was not to be considered for the truth of its contents (Tr. 943-954, 1135-1138, 1142-1144).[7]

The Government never reached, then, much less did it establish by proof *of any sort or degree,* the indispensable subornation question of whether anything of a false nature

[7] Numerals in parentheses preceded by letters "Tr." refer to pages of the Trial Record.

was allegedly being suborned at all. To which should be added that, on the contrary, as was brought out in petitioner's testimony (*supra*), no one having any familiarity with the Hedges investigation or with the Connecticut trial, where petitioner was Hedges' attorney, could have supposed seriously that any mere "push back" of the "Aspelund dates" could be effective for the sinister purpose suggested by the Government. Hedges in the Connecticut trial record alone had committed himself to a date late in 1960 with Cahill.

True, Hedges in the Connecticut trial was not speaking of narcotics, but there is proof that his Connecticut defense was contrived around a structure of basically true facts (cf. 1254-1270), and this is dispositive of any suggestion that Hedges was not in fact still connected with Cahill late in 1960. Pat Hedges testified she prepared the Connecticut trial script in her apartment (Tr. 1022) and all information was furnished by Charles Hedges (Tr. 1029-1030). Miss Kahn's Exhibit "U" was in Pat's writing (4 pages) (Tr. 1023) but Charles denied it (Tr. 668).

Furthermore, if we are correct in our analysis that Hedges' story about the push back of dates is probative if at all only with relation to a time subsequent to his having already testified before the Grand Jury and committed himself to "dates", then there arises the additional compelling question of law as to whether petitioner could have been committing a crime at all in what she is alleged to have done as regards the subornation charge. There is no more elementary principle in the criminal law than that a criminal act cannot arise upon the actor's illusion or error as to the existence or presence of the potential or intended *corpus delecti*. If the facts are as suggested in our analysis—i.e., if it was not probatively established that Hedges and petitioner spoke about the push back of dates until after Hedges had already testified before the

Grand Jury on June 29, 1964—then petitioner could no more be guilty of subornation or of conspiracy to suborn than if she shot a pistol in the night at a tree thinking it a human being, or than she would be if she conspired to murder someone who was already dead.

It remains to consider, on the factual side, the items in the Government's proof which the Court instructed the Jury related particularly to the conspiracy count, i.e., as not being embraced in the basic evidence under the substantive counts. See the Court's charge at 623a-624a. These special "conspiracy" items were the Joan Hedges' testimony about Pacelli's bail assistance to Hedges, the testimony that petitioner asked Mr. Kestnbaum to represent Pacelli on a bail application, petitioner's testimony that she had done some slight commercial legal work for Pacelli, and the admitted facts that Schawartzberg and petitioner are associated as employer and law clerk in her law practice. Manifestly the only purport of all of these items is to show some kind of linkage or connection, not in itself of a sinister nature in any instance, among the three petitioners. None of these items touch at all upon the commanding question of what proof is there that petitioner committed any conspiratorial crime, in view of her acquittal on the substantive counts and in view of the fatal defects above pointed out in regard to the subornation of perjury factor.

We respectfully call attention to *Manley v. United States* (C. A. 6, 1956), 238 F. 2d 221 at 222:

> "But, when an obviously inconsistent verdict as to different counts of an indictment or information is returned by the jury, both the trial court and the reviewing court should be extraordinarily careful to scrutinize the record for the ascertainment of any prejudicial error."

The Court below held, in its opinion, that:

> "The acquittals at most indicate inconsistency in the jury's verdict, which is not by itself grounds for reversal, *Dunn* v. *United States,* 284 U. S. 390 (1932); see *United States* v. *Maybury,* 274 F. 2d 899 (2d Cir. 1960)."

In the case at bar, the same evidence regarding the conspiracy and substantive counts were presented at the trial. Since the substantive counts cleared petitioner by the jury's acquittal then the conspiracy count necessarily falls with it (see *Paar* v. *United States,* 363 U. S. 370 (1960)). Apparently the *Paar* case and the *Dunn* case are in conflict with each other according to the facts in this case. This Court should grant certiorari for this reason also.

The petitioner Kahn was denied a fair trial and due process of law by the Trial Court's rulings in regard to Hedges' claims of the privilege against self incrimination and the attorney-client privilege.

A prime issue in this case was the question of the *bona fides* of the numerous visits by petitioner to Hedges at the Westchester County Jail. These visits were used by the prosecution to the hilt in order to condemn petitioner as having had no cause to visit Hedges except to try to influence him as a prospective witness. It was vital for petitioner to be able to adduce all proper evidence that could depict her visits as having been for legitimate legal consultation with Hedges. This was prevented, however, by the Court's granting of Hedges' invocation in several crucial instances of the privilege against self incrimination or the attorney-client privilege or both of those privileges in combination.

In *Hunt* v. *Blackburn,* 128 U. S. 464, this Court stated that "if the client has voluntarily waived the privilege, it cannot be insisted upon to close the mouth of the attorney". In *Farnsworth* v. *Sanford* (C. A. 5, 1940), 115 F. 2d 375, 377, the Court said:

> "When in such a proceeding a client charged his counsel with misconduct and discharged them, we think he has no right to be free, of contradiction in testifying about the misconduct. He waives the privilege of the communication by himself making it an issue to be tried and testifying about it." [citing Hunt v. Blackburn, 128 U. S. 464, 470.]

See also *Wigmore On Evidence,* Vol. VIII (McNaughton Rev.), § 2327, at p. 638.

See also Chief Judge Sobeloff's concurring opinion in *United States* v. *Kendrick* (C. A. 4, 1964), 331 F. 2d 110, 116-117:

> "Waiver of important rights is not lightly presumed, and will be found only upon a clear and compelling showing. * * * [citing Hunt v. Blackburn, *supra,* Farnsworth v. Sanford, *supra,* and other cases]. With the majority, we recognize that the rule of privilege in the attorney-client relation is subject to an exception when the lawyer is attacked. In that case he may defend himself."

As regards Hedges' resort to the Fifth Amendment privilege in matters as to which he had himself already opened the door, or as to which he had no "reasonable fear" of self incrimination because the statute of limitations had run, we respectfully submit that the Trial Court not only abused its discretion in sustaining his claim of privilege (and thereby

further blocking off petitioner from eliciting vital evidence as to the subjects of her legitimate lawyer's visits to Hedges), but its rulings were erroneous as a matter of law. *Wigmore, op. cit.*, §2276.

The petitioner was denied a fair trial and due process of law by improper summation by the prosecutor.

The prosecutor (at Tr. 1675) practically in so many words said to the Jury that the Government was in possession of some kind of additional secret evidence which it might have used to convict petitioner. The prosecutor's language was

> "* * * With regard to this question of whether or not Hedges ever mentioned the $25,000 bribe to her, do you have any way of knowing whether or not had she denied that the Government could have proved it otherwise".

It is not difficult to surmise what the zealous young prosecutor here had in mind, and in view of the inordinate pretrial publicity which attended this case it is not difficult to guess that the Jury well understood what the prosecutor meant. The prosecutor, if we may speak plainly, was here openly hinting at the Government's supposed possession of incriminating electronic recordings and of the Jencks Act material which was announced in the Jury's presence by the prosecutor over petitioner's objection. But even if our suggested inference is not acceptable to this Court, the prosecutor's conduct was indefensible and caused fatal prejudice.

The petitioner was denied the opportunity for a fair trial of the distinct issue of her own individual guilt or innocence, and a fair trial opportunity to adduce testimony in her defense which she was precluded from using owing to the joinder of defendants in this trial, by the denial of her motion for a severance.

All petitioners in this case moved for severance before the trial, either by independent motion or by adoption of each other's motions. If petitioner had received a severance, she could have called co-petitioner Schawartzberg as a witness, in the confident expectation that he would give exculpative testimony. In the instant trial petitioner was of course precluded from summoning any co-defendant to the witness stand.

The situation thus presented would appear to be effectively if not squarely within the principles laid down in the recent decision by the Seventh Circuit in *United States* v. *Echeles*, 352 F. 2d 892, 897-899 (C. A. 7, 1965), where the Government's petitions for rehearing by the Panel and En Banc to reconsider the reversal of the conviction were denied. The conviction—of an attorney on conspiracy and substantive charges of obstruction of justice and subornation of perjury—was reversed on the ground of improper denial of a severance, in that the joinder of defendants necessarily precluded the defendant-attorney from calling as a defense witness a co-defendant (a former client of his) who might have given exculpative testimony. The Court in *Echeles* wrote as follows, and we respectfully invite this Court's attention to the several points in the following quotation which afford very close resemblances to our case (352 F. 3d at 897):

> "But equally important is the 'universally held' interpretation of this right prohibiting any person who is on trial for a crime *from being called to the witness stand.* 8 Wigmore on Evidence 406 (Claim of Privilege, §2268): McCormick on Evidence, 257-259 (Self-incrimination, §124) (1954). The second protection applies without regard to the nature of the intended inquiry; that is, a defendant on trial cannot be required to take the stand to answer even the most innocuous,

non-incriminating inquiries. Nor does it make a difference whether the defendant is called to the stand by the prosecution or a co-defendant. 8 Wigmore on Evidence 410 (Claim of Privilege, §2268)."

The Court further stated, at 898, *supra*:

"Thus, Echeles could not properly call Arrington as a witness during Echeles' case in chief. For if Arrington declined to take the stand, as was his right, Echeles' action in calling him and forcing him to decline to do so in front of the jury would have injected prejudicial error into the record as to Arrington." • • •

"• • • if an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately."

Our main focus is on the Government's having procured Hedges to feign a continuing attorney-client relationship, and, moreover, to employ guile and enticement to prolong the feigned relationship over a period, variously measured, of some one to two years or more—all done with a view to petitioner incriminating herself. This cardinal—and, we submit, dispositive—constitutional feature of the case went unnoticed in the Government's Brief below.

For understandable reasons, the Government prefers to have a Court view our constitutional contention in the reductive terms of the eavesdropping issue alone. The eavesdrops were not used at the trial, but the fundamental constitutional vice in the Government's having used Hedges for prolonged deceitful exploitation of the attorney-client relationship is intrinsically and ineradicably present in the

record of this case, was duly raised by pre-trial motions, and should not be ignored.

Entirely aside from eavesdrops, Hedges' testimony before the Grand Jury was constitutionally tainted because of the antecedent deceits which subverted the attorney-client relationship.

As regards instructions given to the jury on the elements of subornation of perjury, the following are all of the instructions on that subject (615a, 616a, 618a):

> "Now, the other statute mentioned in this indictment 18 United States Code Section 1622, isn't mentioned up until now. And this makes it an offense against the United States to procure another to commit perjury.
>
> A person commits perjury when, having taken an oath before a competent tribunal in any case in which a law of the United States authorizes an oath fully and contrary to such oath states any material matter which he does not believe to be true" (615a).
>
> • • • • •
>
> "That it was further a part of the conspiracy that defendants unlawfully, wilfully and knowingly would corruptly and by threats influence, obstruct and impede and endeavor to influence, obstruct and impede the due administration of justice in the aforesaid proceeding and investigation and that it was further a part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would procure Hedges to commit prejury in his testimony before a United States grand jury and the United States District Court in the aforesaid proceeding and investigation" (616a).
>
> • • • • •

"Evidence of the same intent and knowledge is required to convict a defendant for conspiring to influence a witness, or conspiring to obstruct the due administration of justice, or conspiring to suborn perjury, as would be required to convict a defendant of committing any one of these three crimes" (618a).

* * * * *"

The above quoted generalized "instructions" on subornation of perjury must have been meaningless to the jury. It is elementary that, at the very least, the jury should have been told that the alleged suborners (or conspiring suborners) must be proved to have known or believed or have good reason to believe that the testimony sought would be false, and also that the witness so sought to testify would do so with knowledge of falsity. *Petite* v. *United States,* 262 F. 2d 788 (C. A. 4, 1959), remanded on other grounds, 361 U. S. 529. See also *Segal* v. *United States,* 246 F. 2d 814 (C. A. 8, 1957), cert. denied 355 U. S. 894.

In view of the evident impossibility (for all of the reasons which we have suggested) of sustaining the conspiracy conviction on the basis of the alleged subornation, the case presents the insurmountable difficulty that since no one can say whether the jury convicted for conspiracy on the basis of obstruction of justice rather than subornation of perjury, the verdict under that count cannot stand at all. Cf. *United States* v. *Robbins,* 354 F. 2d 741, 742 (C. A. 2, 1965), where, in an analogous situation, the Court remarked that "It is impossible to ascertain the exact basis for appellant's conviction", and it reversed the conviction upon finding that one of the two alternative bases upon which the jury might have convicted was not sustainable—which is exactly (indeed *a fortiori*) the situation presented here.

The Government's suggestion that petitioner deliberately invited imposition of the attorney-client privilege to mislead the jury is ridiculous.

The Government's invidious suggestion that petitioner preferred to portray herself to the jury as an attorney who could have told them a great deal more about her legal business with Hedges at the prison if her lips were not sealed by the attorney-client privilege is pure speculation. The only item adduced by the Government in support of this speculation is that petitioner's trial counsel in summation told the jury that petitioner's opportunity to speak more fully about the prison visits had been curtailed because of the Court's sustainment of Hedges' claim of privilege (Tr. 1594).

If we are correct in our contention that it was error to restrict petitioner's testimony in the interests of Hedges' privilege, the error was fatally prejudicial in the most concrete way. A main issue throughout the trial was whether petitioner's numerous visits to Hedges at the Westchester County Jail had or might have had a legitimate explanation on the attorney-client basis. By preventing petitioner from giving additional testimony about what was discussed in those visits, the Court *pro tanto* weakened this vital line of her defense. We think that the measuring of the prejudice thus caused should not be done "with eagle's eyes" to turn the scales of justice against petitioner in these circumstances. It is undisputed that the matters which were blocked off by the restrictive privilege-rulings included at least two or three serious criminal involvements on Hedges' part as to which petitioner wanted to tell the jury of her attorney-client discussions with Hedges at the prison. At the very least, the interference with our further opportunity to impeach Hedges' credibility in these regards was injurious and should be considered in evaluating the overall

prejudice caused by the restrictive rulings above referred to.

The Government's contention, *dehors* the record, that it could have proved guilt from the tape recording and the Jencks Act material is to be condemned.

The prosecutor's statement in summation that the jury had no way of knowing whether the Government could have proved "otherwise", had petitioner denied it, that Hedges had mentioned to her a $25,000 bribe offer (Tr. 1675) is deplorable. The Government seeks to justify the prosecutor's language on the ground that petitioner's trial attorney in summation had told the jury that petitioner had not needed to tell the jury of Hedges having mentioned it to her and that she could have told the jury she never heard of any money (Tr. 1615). If that is the Government's only justification for then having gone on to tell the jury in practically so many words that the Government possessed additional proof not used at the trial, the prejudice and the inflammatoriness remain unallayed. For the Government's rationale here is that a defendant's use of an allegedly false defense in a criminal trial justifies the Government in trying to condemn the defendant in the jury's eyes, not by sworn proof in reply, but by hints and insinuations.

The Government made every effort to have its cake and eat it too—i.e., to avoid the constitutional dangers of using the eavesdrop evidence and at the same time derive the benefit thereof by imputational methods, and by parading a suitcase full of Jencks Act material before the jury and unduly emphasizing the contents.

The Court of Appeals, which held against the petitioner on all issues, acknowledged that there were numerous

errors committed at the trial, but these errors or improprieties, "taken by itself" is not sufficient grounds for reversal.

The Court below agreed with petitioner that the Jencks Act material ought not have been identified in the presence of the jury when Circuit Judge Moore, speaking for the Court of Appeals, stated:

> "[p]erhaps it would be better had the identification of the Jencks Act material been done in the absence of the jury, * * * but this, *taken by itself* is not sufficient grounds for reversal". (Emphasis supplied.)

Johnson v. *United States* (CA DC 1965), 347 F. 2d 803, 806, stands for the rule, *inter alia,* that in order to avoid undue prejudice which may arise from the jury's knowledge that the Jencks Act statements were available to the accused, the motion by the prosecution for their production should be made outside the hearing of the jury, and the actual handing over of the statements should take place with the jury absent, or at least unaware. In *Johnson, supra,* at 806, the Court stated that:

> "In this way full recognition is accorded the rights of the defendant under the Jencks decision as reaffirmed by Congress in the Jencks Act."

During the trial, the Court was the first to mention to the jury and to the prosecution the following regarding the Jencks Act material, at the time that Charles Hedges was still undergoing direct examination:

(117a-118a)

> "THE COURT: * * * And I realize when you conclude with the direct examination of the witness, the defendants are entitled to look at certain papers, and

it may take a little time, but it can't be helped. We will adjourn now until ten minutes past two."

In respect to the Court's remarks the prosecutor said:

(118a-119a)

"MR. JACOBS: Your Honor, I would tell your Honor there is a volume of material for the defendants to look at, your Honor, and I don't know how much time they are going to ask for, but I am just trying to see if we could work it out, your Honor. I have a briefcase full of material, your Honor, and just to give your Honor an idea of what it entails—"

"THE COURT: It may be that the jury will have a fairly long recess after lunch."

The prosecutor, in the presence of the jury, compounded the error by alluding to a "briefcase full of material", simultaneously pointing to a suitcase, and would have then itemized the Jencks Act material but was interrupted by the Court.

At a sidebar conference Schawartzberg objected to the fact that "[T]he government made a statement before about a briefcase full of 3500 material. I think the jurors —it may be best for the jury to have it explained that briefcase—is not necessarily evidence in the case." To which, the Court replied, "I am not going into that now."

The prosecutor then commenced to announce and unduly emphasize all the Jencks Act material for the benefit of the jury. Petitioner's counsel objected to this prejudicial procedure since it was being done in the jury's presence. The Trial Court overruled such objection and stated:

"THE COURT: No, I don't think so. I explained to them yesterday this is a procedure that we go through in

these cases. I think they certainly go through the business of identifying documents."

Taking a cue from the Trial Court's ruling the prosecutor continued to announce, identify and unduly emphasize all the § 3500 material in the jury's presence. Furthermore, Judge McLean continued to bolster the Government's case against petitioners by adding:

"The Court: Now, ladies and gentlemen, defense counsel tell me that they are still far from completed in their task of reading this material which has been turned over, *which I can say is quite voluminous,* and they are certainly entitled to a fair chance to read it, and I think it would be better to let you go now rather than keep you sitting around here for what might be, oh, at least an hour or more, I would think" (Emphasis supplied).

The jury, during the course of their deliberations, requested the reports of the Government's witnesses due to their awareness of the § 3500 material which had been identified by the prosecutor and the Court in the jury's presence. There is no reason why a recess could not have been taken first and after the jury had left the courtroom, the prosecution could have recited and itemized the Jencks Act material. Petitioners were seriously prejudiced thereby, for the prosecution waited until the jury had returned from its recess to read into the record before the jury's eyes and ears all of the Jencks Act material. After the material was handed over to the defense, the Trial Court then permitted the jury to enjoy "a long recess". When the jury returned from recess the Court informed them that defense counsel did not finish reading the voluminous § 3500 material and the jury was instructed to go home and return the following morning. With this admonition

of "quite voluminous" § 3500 material by the Court and prosecution, the jury was compelled to consider that the evidence against petitioners was overwhelming. The minds of the jurors were unequivocally prejudiced thereby. The Court below cited *Roberson* v. *United States* (6 Cir.), 282 F. 2d 648, 650-651, cert. denied, 364 U. S. 879 (1960) against petitioners but a review of said case shows that *Roberson* failed to object while petitioners timely and successively objected thereto. See, also, *Reichert* v. *United States* (CA DC 1966), 359 F. 2d 278, footnote 5 at p. 281 for the Court's views that Jencks Act material should be conducted outside the jury's presence, and the motions therefor plus the actual handing over of the material should take place with the jury absent.

The opinion further recites that the prosecutor did make an improper remark in his summation when he alluded to the existence of unused evidence.

In *Reichert* v. *United States, supra,* the Court, in reversing the conviction held that a reference by the prosecutor, on examination and upon summation, to statements taken from a witness which were never received in evidence was prejudicial error. Cf. *Kitchell* v. *United States* (1st Cir. 1966), 354 F. 2d 715 where the prosecution's references in summation to the availability of unused evidence constituted reversible error.

Not only was petitioner prejudiced by the Jencks Act material being itemized in the jury's presence, but the prosecutor alluded to this unused evidence, not in evidence, which moved the jury to request some of the Jencks Act material during their deliberations. But the prejudice had infected the juror's minds.

One cannot escape the fact that the Court's decision below in the instant case has now granted a blank check to the prosecution to intercept attorney-client conversa-

tions. Moreover, this carte blanche power, under its affirmance below, may possibly be construed as extending to any Assistant United States Attorney without authorization from a superior.

It is frightening to learn how vulnerable a lawyer is when faced with the systematic stripping away of one of the more fundamental rights enjoyed by people with a tradition of freedom and that right is the right to privacy in attorney-client conferences. The eavesdropping employed in the case at bar by separate teams of Government agents at the Westchester County Jail is shocking. The use of eavesdropping methods is inimical to our system of criminal justice.

The electronic surveillance evidence was gathered against petitioner in a constitutionally protected area, when she brought her law office to the infamous Westchester County Jail, scene of the Lanza brothers' invasion of privacy.

The constitutional right of privacy has been advocated in vigorous dissents since the days of Brandeis. Cf. *Griswold* v. *Connecticut,* 381 U. S. 479 (1965); *Clinton* v. *Virginia,* 377 U. S. 158 (1964) for the recognition of a constitutional right of privacy.

In *Lanza* v. *New York,* 370 U. S. 139, 144 (1962) this Court recognized that even in jail:

> "[T]he relationship which the law has endowed with particularized confidentiality must continue to receive unceasing protection."

This Court found that no attorney-client relationship had been alleged in *Lanza.* The case at bar presents a far different factual situation representing far more serious values, i.e., the attorney-client relationship. While we may concede, *arguendo,* that the privilege is solely the client's, this common-law rubric can in no way be inter-

preted as a license *ipso facto* for the Government to eavesdrop. This is particularly true where Hedges, the client involved, bargained with the Government.

While the Court below has isolated the errors in its opinion as insufficient to reverse when standing alone it is discernible from the four corners of its opinion that the errors do not stand alone. Indeed these errors fed and nourished each other to weave, in the end, a blanket of errors which deprived petitioner of her constitutional rights.

It is more than irony for the Court below to approve the practice of eavesdropping which the President of the United States has rejected. We cannot conceive that this great Court will lend its prestige to this sordid business engaged in by the Government in placing its imprimatur thereon, neither can we conceive that the Government would shy away from using this case as a license to continue such practices upon other attorneys throughout the country.

It should be noted that the Trial Court ruled that petitioner was Charles Hedges' attorney during the Westchester County Jail attorney-client visits in this case. District Judge McLean, in his opinion denying petitioner's motion to suppress the eavesdropping tapes and all evidence pertinent thereto, stated as follows *United States* v. *Kahn* (SDNY 1966), 251 F. Supp. 702 at 706:

> "For the purposes of this motion, I shall assume that the attorney-client relationship existed at the relevant times, i.e., October 1963 and September and October 1964."

The Court below agreed there was a legitimate lawyer-client reason for the many visits by petitioner to Hedges in prison.

Hedges never informed petitioner she was no longer his attorney from the moment Hedges entered into the secretive agreement with the Government to pose as her client after all petitioner's legal services in Hedges' behalf had been performed on the judgment which Hedges was confined under. Petitioner has steadfastly proclaimed her innocence of the crimes charged to her. Petitioner never went to Hedges with any offers of bribes and with veiled threats that he better not testify against Pacelli. There were *four* eavesdrop recordings made by the federal agents of the conversations which ensued between petitioner and Hedges. The agents were also physically present in the Westchester County Jail at the time these respective recordings were made. They had an apparatus which permitted them to personally hear and eavesdrop upon the attorney-client conferences. Yet, neither the eavesdrop recordings nor the personal testimony or § 3500 reports of the federal agents were able to confirm Hedges' and his wife's concocted story pertaining to any bribe purportedly offered by petitioner.

Moreover, it is of significance to observe that one of the key witnesses, used by the Government against Pacelli at his trial for conspiracy to violate the narcotic laws, one James Godwin, who happens to be a cousin of Charles Hedges, another key witness at Pacelli's narcotic trial, caused Godwin's emissary to notify co-petitioner Schawartzberg that the Government was about to send the eavesdropping tapes to a sound laboratory to be edited and doctored so as to incriminate petitioner. This unsolicited tip on Godwin's part spurred Schawartzberg to forthwith move the District Court (TENNEY, J.) for the impoundment of the eavesdropping tapes. See Appendix F hereto, infra, for the Court's order. See, also, Appendix F for another order made by the District Court (SUGARMAN,

J.) which excluded the main federal agent, Thomas J. Dugan, from attending at the reclarification process. When Schawartzberg discovered that the tapes' seal had been broken without authorization by the Court, he then moved to have two prosecutors and agents cited for contempt. See Appendix G hereto, infra, for the Court's order denying said motion. Schawartzberg appealed the order as being interlocutory under Docket No. 30381 and the Court below dismissed the appeal. There was a petition for certiorari filed as Misc. No. 228 which is currently pending for decision by this Court. If ever there was a case of "dirty business" this is it. Appendix J hereto, infra, supports our position in that an electronic expert submitted his affidavit to the Court expressing violation on the part of the prosecution and Government agents.

The Government represented to the Trial Court it was going to use the eavesdropping tapes [506-508][8] against all defendants [508]. The Trial Court denied petitioner's motion for suppression of these tapes and/or the fruits thereof *United States* v. *Kahn* (SDNY 1966), 251 F. Supp. 702; see, also pp. "S1a to S16a" inclusive of petitioner's Supplemental Appendix appended to her main brief for the opinion (*ibid*). The Government went so far as to have Judge McLean waste more than four hours listening to the three or four taped eavesdrop recordings and then failed to play these tapes for the jury's benefit notwithstanding the petitioner's motion for suppression thereof and its fruits was denied. The answer lies in the fact that these tapes were used against petitioner to her substantial prejudice, e.g.:

1. (Tr. 1378) On cross-examination petitioner admitted discussing the Ambassador's case with Hedges on September 27, 1964, [one of the taped sessions];

[8] Numerals in brackets refer to pages of pre-trial record.

2. (Tr. 1392) Petitioner further admitted she told Hedges that Pacelli told her he would get "legal aid" for himself after his arrest;

3. (Tr. 1393) Petitioner was not sure whether Hedges told her "if Pacelli needed legal aid, where was Pacelli going to get $25,000 which I once told you about".

After obtaining on cross-examination, these statements from petitioner, which were audible on the tapes of three taping sessions, the Government didn't elect to use the tapes on rebuttal for they had accomplished their aim during her cross-examination.

Charles Hedges was the one who informed petitioner that someone had offered him a bribe not to testify against Pacelli and the others involved in the narcotics trial. Petitioner did not make any offer to him of any bribe. The eavesdropping tapes support petitioner in that the following is clearly audible:

By Charles Hedges:

"If Pacelli needed legal aid when he was arrested the other day, how was he going to pay me $25,000 which I once told you?"

By Frances Kahn:

"I told you not to believe him. They all promise you the world and give you Arpege."

Does the foregoing sound like a statement made by petitioner, a purported bribe offeree to Hedges? It should be remembered that Pacelli had just been arrested and was to later proceed to trial with Hedges as the chief witness against him, and if ever the bribe had to be offered it was

then. Instead, petitioner was discouraging Hedges as she had once done when informed of the bribe attempt by Hedges himself at the jail. However, the fruits of the tapes were used against petitioner at the trial in extracting the affirmation of a $25,000 discussion from her.

It has been held that eavesdropping on the conversations between an accused and his counsel by installing hidden electronic devices in the consultation room or planting informers to spy on the defendant's strategy violates the accused's right to communicate with his counsel and intrudes on privileged communication, and any information obtained thereby is not admissible in evidence.

In *Caldwell* v. *United States* (1953), 92 App. D. C. 335, 205 F. 2d 879, a government informer who won the confidence of a defendant and counsel so conducted himself that he gained free access to the planning of the defense, and he was present in a number of conferences with witnesses and lawyers for the defendant and reported whatever information he gained to the prosecution, including many matters connected with the impending trial of the defendant. It was pointed out that high motives and zeal for law enforcement cannot justify spying upon and intrusion into the relationship between a person accused of crime and his counsel, and that the Constitution's prohibitions against unreasonable searches, and its guaranties of due process of law and effective representation by counsel, lose most of their substance if the government can, with impunity, place a secret agent in a lawyer's office to inspect confidential papers, to listen to their conversations, and to participate in their counsels of defense.

Also, the conduct of sheriff's deputies in eavesdropping on the conversations between a defendant and his counsel was held to vitiate the whole criminal proceeding against the defendant in *State* v. *Cory* (1963), 36 Wash. 2d 371, 302

P. 2d 1019, 5 ALR 3d 1352. In *Cory*, the defendant appealed from a conviction of burglary and larceny, assigning as error the lower court's denial of his motion to dismiss the case, grounded upon defendant's claim that he was denied the full enjoyment of his right to counsel. It appeared that after defendant had consulted with his attorney several times, he discovered that his conversations were being eavesdropped upon through a microphone installed in the conference room, and when the matter was reported to the trial court, it conducted an investigation and discovered that the conference room did contain a microphone and that the conversations were listened to by the sheriff and his officers, whereupon the trial court ordered that the tapes be played for defendant and his counsel and also directed that the prosecutor might hear the recordings. Holding that the conduct of the sheriff's officers deprived defendant of effective representation of counsel, the Court stated that an attorney cannot make a full and complete investigation of both the facts and the law unless he has the full and complete confidence of his client, and that such confidence cannot exist if the client cannot have the assurance that his disclosures to his counsel are strictly confidential.

Although the Trial Court ruled that the privilege belonged to the client and not to the attorney, this case is exceptional in that petitioner was never notified, inferentially or otherwise, that she no longer represented Charles Hedges. This Court shouldn't view Hedges' testimony as evidence since he is an egregious self-confessed multiple prejurer, a narcotics seller, a murderer, etc. Hedges sought to use petitioner as his puppet simultaneously gaining favor with the Government. Despite the fact he confessed to his participation in a Florida murder he refused to admit to the jury that he killed Joseph Cahill for the large

sum of money which Cahill had in his possession during the Hedges-Cahill Connecticut trial at the time both of them were contemplating retainer of petitioner to represent Cahill. Although Hedges confessed in open Court that he killed the person with whom he had the gun fight—he never had previously admitted to the Government that he had shot and killed this person.

Furthermore, Hedges testified it was up to petitioner, not him, to waive the attorney-client privilege as recent as May, 1965 (Pacelli Trial Record, pp. 728-729, *id.*). Evidently Hedges rejected, asserted, feigned, etc., and reclaimed the privilege as was momentarily convenient. If a defendant would prevail upon a Government witness to deceive the Government into believing he was cooperating with them, the defendant would be arrested. Under our adversary system it was improper and wrongful for the Government to knowingly permit client Hedges to practice the deception upon his counselor.

It is apropos to mention that the Court below found there were two respective simultaneous electronic eavesdropping operations aimed at the Kahn-Hedges conferences at the jail. (See Motion to Suppress Hearing Minutes, p. 150; cf. *United States* v. *Kahn,* 251 F. Supp. 702, 705-706, *supra.*) The Court fixed the eavesdropping dates at that time as being December 1963 (at 705 *id.*), which is beyond the two months period permitted by the eavesdropping order executed September 20th, 1963 by State authorities in conjunction with Charles Hedges' consent given September 20th, 1963. Apparently both teams of eavesdroppers were listening illegally. See Appendix E hereto, *infra,* for the Eavesdropping statutes in New York State.

A constitutionally protected area is that area which the law has endowed with particularized confidentiality and receives unceasing protection against unlawful invasions.

See *Lanza* v. *New York* (1962), 370 U. S. 139. In *Lanza*, this Court wrote:

> "Though it may be assumed that even in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection, *there is no claimed violation of any such special relationship here.*" (Emphasis added)

The bugging practices used in this case was not licensed by this Court's decision in *Lanza* v. *New York,* 370 U. S. 139 (1962), *supra.* The Government has used the Lanza decision to forge new frontiers in the violation of individual privacy. If this decision is allowed to stand by this Court who knows what new frontiers the Government will invade? The Lanza decision came at a time when it wasn't clear that the practice of bugging was going to become a major force. No possible radiation of the Lanza decision can justify the bugging in this case. Petitioner is in a better factual situation than Lanza. Whenever this Court limits a decision the Government implicitly contends it is mere dicta and takes the result and expands the limited doctrine. Indeed, this case is the *reductio ad absurdum* of Lanza. This Court need not overrule Lanza but alternatively, this Court should exercise its supervisory powers over the administration of criminal justice in view of the attorney-client conferences herein which were bugged by the Government. It is not enough that the Government didn't use the tapes before the jury. They made their case through these tapes which resulted in a conspiracy conviction against petitioner.

Harry Lanza visited his brother, Joseph, who was incarcerated in the same Westchester County Jail assailed herein. He and his brother were left in the visiting room

to converse freely. No prison official was present. Unknown to them, however, a hidden electronic device was relaying their conversation to jail officials. Each word of the conversation was being transcribed and became a permanent record in the hands of law enforcement officials.

While a visiting room in a prison building is not constitutionally protected for most visitors, this Court recognized that it must give this protection where a confidential relationship is involved, *Lanza, supra,* (at 143-144). When the attorney was visiting her other clients at the same jail, did the electronic device suddenly turn itself off? Can electronic surveillance listen to one client and not to the other? Even if selectivity somehow could be accomplished technologically, would not the danger of this electronic surveillance still be great where it is operated by law enforcement officials who have an interest in everything which might be said? Does this mean that one in jail has no place where he can talk to a lawyer without being overheard through the ominous eye of surveillance? Has a lawyer no place where she can express herself or nowhere that she can talk with her client in privacy? When an attorney goes to a jail to visit her clients *she brings her law office with her.* Just as a doctor visits his patient in a hospital and comparable to a priest visiting a penitent.

For the Westchester County Jailer to permit petitioner to visit, confer and consult with Charles Hedges and other clients in an attorney-client relationship in a constitutionally protected area at the prison and then to secretly have client Hedges reject the benefits of such attorney-client immunization and to secretly record their conversations with the Government's connivance, does violence to the constitutional mandates prescribed by the Fourth, Fifth, Sixth and Ninth Amendments to the United States Constitution. There is no general federal statute prohibiting

eavesdropping. However, it appears from the concurring opinion of Chief Justice WARREN, in Lopez, *infra,* therein the Court implied that except as used in *Lopez* v. *United States,* 373 U. S. 427, 441 (1963), all other types of eavesdropping are condemned by the Fourth Amendment. Furthermore, three of the dissenting Justices in Lopez, *supra,* at 446, stated that all electronic eavesdropping, including wiretapping, are violative of the privacy clause of the Fourth Amendment.

Further, with this Court invalidating the State of Connecticut's birth control statute in *Griswold* v. *Connecticut,* 381 U. S. 479 (1965), it becomes hopeful that in the near future all types of wiretapping, and other forms of electronic eavesdropping, will be outlawed. The connection between the *Lopez* and the *Griswold* cases is the right to privacy, which in the Connecticut decision has been given a constitutional home for the first time.

Moreover, this Court should take judicial notice of the following:

a) Hedges' cousin James Godwin, the Special Employee, had informed petitioner that his superiors, the prosecution and agents, were about to send these eavesdrop tapes to a sound studio for alteration and editing in order to incriminate petitioner;

b) That the counsel room at the jail was a constitutionally protected area between an attorney and client;

c) That Judge TENNEY expressed the view that the prosecution was "sparring around" (347-348);

d) That Judge MCLEAN concurred in the view by stating that the Government was adding to its burden by "messing around" (630) with the tapes;

e) That former prosecutor Jacobs broke the chain of possession by breaking the seal of the master carton which contained the complete set of reclarified tapes;

f) That several federal agents participated in eavesdropping surveillance on the Kahn-Hedges conferences without any notice among them or to their superiors;

g) That an *ex parte* order was obtained by the Westchester County District Attorney on September 20, 1963, but a further order was rejected by the State Supreme Court and notwithstanding, the agents and Deputy Sheriff Thela (of Lanza eavesdropping fame) continued to record the Kahn-Hedges conversations;

h) That there was a long interval from the pre-arrest stage to the actual arrest. (Schawartzberg will treat this item more fully in his petition for certiorari.)

Insofar as Hedges' claims of privileges are concerned, if the answer to a question cannot in any way incriminate the witness, he must answer—there is then no constitutional right to remain silent. *United States* v. *Swift,* 186 Fed. 1002, 1009; cf. *Smith* v. *United States,* 337 U. S. 137. After the witness has given incriminating testimony, the privilege cannot be availed of—not so much because it has been "waived", but because the claim that further testimony would incriminate is untenable, incrimination having already occurred. See *Schoeps* v. *Carmichael,* 177 F. 2d 391, cert. den. 339 U. S. 914. It does not seem consistent for Hedges to testify against petitioner; claim his answers may be incriminating, Wigmore on Evidence, § 2272; *Maffie* v. *United States,* 209 F. 2d 225; 40 Amer. Bar Assoc. Journal 404, 502; 41 *ibid.* 307, and to then seal petitioner's lips when endeavoring to defend herself. See, too, 33 Univ. Chi. L. Rev. 151 (1965) Effect of Self Incrimination Upon the Accused.

With reference to the Fifth Amendment, Supreme Court Justice HOFSTADTER wrote in the "Aspects of the American Way" at p. 19 thereof:

> "Reliance on paid informers, without confirmation of secret charges and without opportunity of confrontation or rebuttal, is basically repugnant to American institutions."

If Charles Hedges was actually offered a bribe, then at any time during the two year period ending with the last visit of April 18, 1965, Charles Hedges could have requested that the $25,000 "be brought to the jail" and then, the prosecutor would not have had the need to testify in summation on behalf of the Government.

The prosecutor further remarked "that payment came from the defendant Pacelli" for those thirty visits to the Westchester County Jail (573a). This was an unfair statement of the case. The prosecutor knew from the testimony of Charles Hedges at the pre-trial motion to suppress hearing that Hedges had deceived petitioner into believing she was still his lawyer by falsely preparing legal documents for her perusal and approval which, of course, necessitated many visits to the jail, which was done with the connivance, concurrence, knowledge and participation of the United States Government Attorneys and Agents. The Court agreed that "there certainly is no evidence that the defendant Pacelli paid petitioner anything for going to the Westchester County Jail" (573a). In *United States* v. *Pepe* (2 Cir. 1957), 247 F. 2d 839 at 844, the Court condemned the prosecutor's summation for "[T]here was no basis in the record for the argument by the government that the testimony was 'bought, paid for, and delivered'."

In the colloquy which ensued between the prosecutor and the Court, Mr. Martin stated that the jury may draw

an inference that Pacelli paid Miss Kahn for the visits (573a). The Court replied (573a-574a):

> "The Court: Well, whether they can draw it or not, it should be very clear that this is purely an argument that they can draw an inference.
>
> "Mr. Martin: It certainly is.
>
> "The Court: And there is certainly no evidence of any such thing."

This colloquy had to confuse the minds of the jurors and could easily have led them to believe it was proper argument since they could not reasonably evaluate the difference between evidence, inference and argument. The jury was further confused by the Court's denial of all defense motions at that juncture for a mistrial (574a-575a).

The prosecutor improperly stated (565a-566a):

> "If defense counsel had any thought that his testimony, that that incident was anything other than self-defense, you can be sure that they would have gone into that on his cross-examination, but they avoided it and I submit that shows that they knew that this was self-defense—"

The defense objected thereto and it was sustained but the jury was not given any cautionary instructions with respect thereto. As far as further improper comment on the part of the prosecution is concerned, he misstated the facts to the jury that Charles Hedges "had no active case pending against him" when he knew that there was and still is a gun charge pending against him. All counsel agreed not to bring out the Hedges' shooting incident. The prosecutor misled the jury concerning the thirty-odd visits to the jail knowing full well that Miss Kahn visited

Hedges on some of the occasions with the knowledge of the Government concerning the practice of their deception upon her of legal work etc., which had been foisted upon her by Charles Hedges (Tr. 1668-1669), and he then stated no legal work had been done (Tr. 1669). Objections were properly and timely taken to the improprieties.

The Court below conceded that the prosecutor's allusion to other evidence was "improper" in his closing argument to the jury.

The Court of Appeals opined that although Schawartzberg could have testified in petitioner's behalf at a separate trial, "this possibility, standing by itself, did not make the denial of a motion for severance erroneous". The Court below added that "in the absence of anything in the record indicating that the co-defendant would have given exculpatory evidence." Petitioner respectfully refers this Court to co-petitioner Schawartzberg's petition for certiorari to be filed in the next day or so, for pertinent portions showing he has consistently offered exculpatory statements in petitioner's behalf and would have testified in petitioner's behalf had not the motions for severances been denied. He will also treat the denial of the change of venue in his petition for certiorari.

In *Roberson* v. *United States,* 364 U. S. 879 (1960) this Court denied certiorari. The Court below cited *Roberson* against petitioner. However, a reading of Roberson's petition for certiorari discloses that Roberson failed to object to the Jencks Act material being identified in the jury's presence. The Solicitor General's opposition thereto in *Roberson* recites, in pertinent part (at p. "11"):

> "There was no impropriety in permitting the jury to know that the government had turned over statements of government witnesses to the defense. No

objections on this ground were raised when the government attorney announced delivery of the statements. In view of the fact that defense counsel in the presence of the jury had made an unsuccessful motion for delivery of the statements by the witnesses at the start of the trial, it was not unreasonable to allow the jury to know that the prosecution had delivered the statements later in compliance with the statute."

Each of the foregoing questions presents vital and important questions calling for the supervisory power of this Court in criminal justice. As stated in *Olmstead* v. *United States* by Mr. Justice Brandeis, 277 U. S. 438, 485, "Our government is a potent, the omnipresent teacher". All of these highly important questions of criminal law in its supervisory capacity and in consideration of great and important questions of criminal justice under the standards of the United States of America should be passed on by this Court. If the Government could intrude with impunity, so would the defense lawyers into the offices of the prosecution their witnesses and their investigating agents.

The decision which this Court may render in this case will tell whether counsel and clients are guaranteed from unlawful intrusion by opposing prosecuting counsel or their secret agents and whether this relationship is protected by the Sixth Amendment to the Constitution of the United States; also by the Fifth Amendment to the Constitution of the United States entitling a defendant to the protection against self-incrimination and to procedure that results in a fair trial, as guaranteed by the due process clause of the Fifth Amendment, and by the Fourth Amendment, forbidding illegal searches and sei-

zures and by the Ninth Amendment, all embracing the right of privacy.

Basic justice, guaranteed by our federal Constitution, requires that these rights be safeguarded and preserved. We believe that the purity of justice must eventually be preserved by the courts where justice is exemplified. (*Olmstead* v. *United States,* 277 U. S. 438) The courts are the great teachers. Anything that pollutes justice at the beginning, contaminates the whole stream. It is only the courts rejecting evidence secured by any unconstitutional methods (*Mapp* v. *Ohio,* 367 U. S. 643, 6 L. Ed. 2d 1081) that can prevent injustice.

Petitioner hereby adopts all reasons in co-petitioner Schawartzberg's petition for certiorari insofar as they may be applicable to her.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be granted.

Dated: September 23, 1966.

Respectfully submitted,

FRANCES KAHN
Petitioner pro se
Member of the Bar
of the United States Supreme Court

O. JOHN ROGGE, ESQ.
Of Counsel

APPENDICES

APPENDIX A

Opinion of United States Court of Appeals, Second Circuit, Affirming Judgment of Conviction

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 438—September Term, 1965.

(Argued June 3, 1966 Decided July 18, 1966.)

Docket No. 30430

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANCES KAHN, VINCENT PACELLI and ISRAEL SCHAWARTZBERG,

Appellants.

Before:

MOORE, SMITH and KAUFMAN,

Circuit Judges.

Appeals from judgments of conviction for endeavoring to obstruct justice and conspiracy to obstruct justice, 18 U. S. C. §§1503, 371, entered in the District Court for the Southern District of New York after trial before Edward C. McLean, *Judge,* and a jury. Affirmed.

JEROME LEWIS, Brooklyn, N. Y. (Frances Kahn, Bronx, N. Y., and Abraham Glasser, New York, N. Y., with him on the brief), *for the appellant Frances Kahn.*

ROBERT KASANOF, New York, N. Y. (Albert J. Krieger, New York, N. Y., with him on the brief), *for the appellant Pacelli.*

ISRAEL SCHAWARTZBERG, Bronx, N. Y., *pro se.*

JOHN S. MARTIN, JR., Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., and John E. Sprizzo, Assistant United States Attorney, with him on the brief), *for the appellee.*

MOORE, *Circuit Judge*:

Frances Kahn, Vincent Pacelli, and Israel Schawartzberg appeal from judgments of conviction. All three were convicted of conspiracy to obstruct justice and suborn perjury, in violation of 18 U. S. C. §§371, 1503, and 1622. In addition, Pacelli was convicted of obstructing justice in violation of 18 U. S. C. §1503. Each appellant was sentenced to two years' imprisonment on the conspiracy count. Pacelli also received a two-year concurrent sentence on the substantive count.

1. *The Sufficiency of the Evidence.*

The Government maintained at trial, and the jury found, that the appellants worked together in an effort to prevent one Charles Hedges from testifying against appellant

Pacelli. On appeal, each of the appellants challenges the sufficiency of the evidence as to the counts on which he or she was convicted.

Viewing the evidence in the light most favorable to the Government, *United States* v. *Kahaner*, 317 F. 2d 459, 467 (2d Cir.), *cert. denied*, 375 U. S. 836 (1963), the following story emerges from the testimony at trial. Hedges was convicted for violation of the federal narcotics laws and was sentenced to fifteen years' imprisonment by the District Court of the District of Connecticut in March 1961. In July 1962, Hedges agreed to testify against certain of the people with whom he had been associated in the narcotics trade. His testimony before a grand jury in the Southern District of New York in June and September 1964 contributed to an indictment against Pacelli and others for conspiracy to violate the federal narcotics laws. Hedges testified at the trial on that indictment in May 1965.

Towards the end of July 1962, Pacelli visited Joan Hedges, Hedges' first wife; gave her $500; found out that Hedges needed $5,000 to get out on bail pending appeal; and learned that his lawyer was Frances Kahn. On July 30, 1962, Schawartzberg, Kahn's legal secretary, met with Hedges' fiancee and future wife, Patricia Curtin; gave her $3,000 of $5,000 he apparently had received; and instructed her to use the money to open a savings account to be used as collateral for Hedges' bail.

On January 9, 1963, Schawartzberg introduced Pacelli to Hedges' second wife Patricia, saying that Pacelli had put up the money for Hedges' bail. Pacelli told Patricia that he would give Hedges and her as much money as they needed to go away pending the appeal and even afterwards. Schawartzberg told Patricia that "he [apparently meaning

Pacelli] just doesn't want Charlie to do anything against him."

On January 14, 1963, Schawartzberg called Patricia, asked if Charlie was still Pacelli's friend, and said that Kahn was going to visit Charlie. Two days later, Kahn visited Hedges and asked what he intended to do. When he said, "Tell them to run because I'm through with them," she said: "I don't think that's like you. You wouldn't do anything like that." She made similar statements during her repeated later visits to Hedges whenever he indicated that he was thinking of "talking."

On September 22, 1963, Kahn told Hedges that if he didn't testify, Vince would lend him $25,000, which he wouldn't have to repay if he were indicted again, and that he would have complete protection.

In July and September 1964, Kahn told Hedges that if he were called before the grand jury he should push back the dates of his dealings in narcotics so that prosecution would be barred by the statute of limitations. In her July visit, she also told Hedges that if he did testify he should make sure that the Government guaranteed his wife's protection, since she was afraid for him and his wife; and she suggested that if he acted crazy he wouldn't have to testify. In an August 1964 visit, apparently referring to Hedges' intention to testify, Kahn said: "I hate to see you destroy yourself, and that's what you'll do."

The evidence just summarized was ample to take to the jury the question of appellants' guilt on the conspiracy count. We find no force in the contentions of Kahn and Schawartzberg that their acquittals on the substantive counts demonstrate the insufficiency of the evidence against them on the conspiracy count. The acquittals at most indicate inconsistency in the jury's verdict, which is not by

itself grounds for reversal, *Dunn* v. *United States*, 284 U. S. 390 (1932); see *United States* v. *Maybury*, 274 F. 2d 899 (2d Cir. 1960). The inconsistency here was not irrational, since the jury could have believed that Schawartzberg and Kahn, while working together with Pacelli, did so at his bidding and were correspondingly less culpable.

The evidence as to Pacelli's membership in the conspiracy was also sufficient to go to the jury. The jury properly could have found not only that Pacelli was working with Schawartzberg and with Schawartzberg's employer Kahn in an effort to keep Hedges quiet, but also that their joint efforts lasted up until the time Hedges began to testify before the grand jury. See *United States* v. *Perlstein*, 126 F. 2d 789 (3d Cir.), *cert. denied*, 316 U. S. 678 (1942).

Pacelli contends that the evidence against him on the substantive count was insufficient as a matter of law, since at the time involved in that count—January 9, 1963—there was no pending proceeding in which Hedges was to testify. See *Pettibone* v. *United States*, 148 U. S. 197, 207 (1893); *United States* v. *Scoratow*, 137 F. Supp. 620 (W. D. Pa. 1956). We need decide neither the correctness of *Scoratow* nor its application to a case in which the potential witness has actually agreed to testify. Pacelli's sentence on the substantive count was concurrent and of the same length as his sentence on the conspiracy count, and we conclude, for reasons set out elsewhere in this opinion, that his conviction on the conspiracy count should be affirmed. See *Lawn* v. *United States*, 355 U. S. 339, 362 (1958); *United States* v. *Benjamin*, 328 F. 2d 854, 856 (2d Cir.), *cert. den.* sub nom. *Howard* v. *United States*, 377 U. S. 953 (1964).

We find no merit in Pacelli's contention that because he rested his case and moved for acquittal at the close of the

Government's case, the jury should have been instructed to consider as against him only the evidence adduced on the Government's case. The question of the sufficiency of the Government's case was a legal one; and once the trial court had decided that the Government's case was sufficient to go to the jury, we see no reason why the jury should not also have been free to consider the testimony of Pacelli's co-defendants.

2. *The Motions for Severance.*

Each of the appellants attack the denial by the trial court of his or her motion for a severance. Pacelli contends that the trial court should have severed the case as to him because he was prejudiced by the testimony of Kahn during the presentation of her defense, which tended to establish a link between Kahn and Pacelli which had been supplied only inferentially in the Government's case. This did not by itself require the trial court to sever Pacelli's case, see *United States* v. *Houlihan,* 332 F. 2d 8, 15 (2d Cir.), *cert. denied* sub nom. *Legere* v. *United States,* 379 U. S. 828, 859 (1964), particularly since Kahn's testimony in no way indicated that she worked together with Pacelli in attempting to keep Hedges quiet. Pacelli also maintains that he was prejudiced by his codefendants' arguments that the whole case was an unfair attempt by the Government to destroy Kahn as a lawyer, since the jury may have thought it had to convict all three defendants in order to clear the Government of the charges made by Schawartzberg and Kahn. We believe that the danger of prejudice to Pacelli from his codefendants' position was far too remote to require severance. The jury could presumably keep separate the positions of the three defendants in this relatively short and

simple trial. Cf. *United States* v. *Bentvena*, 319 F. 2d 916, 930-31 (2d Cir.), *cert. denied* sub nom. *Ormento* v. *United States*, 375 U. S. 940 (1963).

Kahn and Schawartzberg contend that the denial of their motions for severance unfairly restricted their right to call witnesses. Their position appears to be that their joint trial made it less likely that Schawartzberg would give exculpatory evidence for Kahn, since at a joint trial, if Schawartzberg testified at all, he would waive the right not to answer questions about the crime charged, *Johnson* v. *United States*, 318 U. S. 189, 195 (1943); McCormick, Evidence §131 (1954), whereas at a separate trial of Kahn, Schawartzberg could have testified in her behalf while refusing to answer questions which incriminated him. This possibility, standing by itself, did not make the denial of a motion for severance erroneous, *Gorin* v. *United States*, 313 F. 2d 641, 645-46 (1st Cir.), *cert. denied*, 374 U. S. 829 (1963); *Olmstead* v. *United States*, 19 F. 2d 842, 847-48 (9th Cir. 1927), *aff'd*, 277 U. S. 438 (1928), at least in the absence of anything in this record indicating that the co-defendants would have given exculpatory evidence, see *United States* v. *Echeles*, 352 F. 2d 892 (7th Cir. 1965).

3. *The Charge on Conspiracy.*

The trial court's instructions as to the law of conspiracy, attacked by Pacelli as not adequately focusing the attention of the jury on the questions whether the evidence established one conspiracy or many and whether Pacelli was a knowing member, were entirely proper in the context of this case. The court not only instructed the jury that it had to find that the conspiracy existed as charged in the indictment, but also that the defendants knowingly associated themselves with the conspiracy and that each defend-

ant's association with the conspiracy had to be determined only from evidence as to that defendant's own acts, declarations, and conduct. See *United States* v. *Stromberg,* 268 F. 2d 256, 264-65 & n. 10 (2d Cir.), *cert. denied,* 361 U. S. 863, 868 (1959).

4. *The Conduct of the Prosecution.*

At several of the interviews between Kahn and Hedges while the latter was in prison, electronic equipment was placed with the consent of Hedges both on Hedges and around the room in an effort to record the conversations between the two. The resulting tapes were not particularly intelligible, since Kahn carried a portable radio with her on her visits and turned it up whenever she had anything important to say.

Appellants' pre-trial motions to suppress these tapes were denied. We do not need to consider the merits of those motions, since the tapes were not introduced or mentioned at trial. Kahn and Schawartzberg contend that the prosecutor hinted at the existence of the tapes in his summation, when, after Kahn's counsel had pointed to Kahn's candor in testifying about the offer of money to Hedges, the prosecutor said, "Do you have any way of knowing whether or not had she denied that the Government could have proved it otherwise?" This brief remark, improper though it was, did no more than suggest the possession of further proof by the Government, if indeed it did that much: Hedges had testified for the Government as to the offer. Even if the tapes were unconstitutionally obtained, this fleeting reference did not amount to the use at trial of unconstitutionally obtained evidence. Cf. *United States* v. *Guerra,* 334 F. 2d 138 (2d Cir.), *cert. denied,* 379 U. S. 936 (1964).

Nor should the trial court have dismissed the indictment because of the possibility that the tapes might have been played before the grand jury. Even if the tapes were illegally obtained, their admission before the grand jury would not justify the relief requested unless the defense was able to show that the indictment rested solely on incompetent evidence. See *Costello* v. *United States,* 350 U. S. 359 (1956); *Lawn* v. *United States,* 355 U. S. 339 (1958); *Cochran* v. *United States,* 310 F. 2d 585, 590 (8th Cir. 1962). Here, both Hedges and his wife Patricia testified before the grand jury, and their testimony was both competent and ample grounds for the indictment.

Kahn maintains that the conduct of Hedges amounted to entrapment. She requested no charge on entrapment at trial, and was entitled to none. There is no testimony in the record which suggests that Hedges ever asked for money for his wife or himself in return for not testifying.

Kahn and Schawartzberg contend that the use of Hedges, if not entrapment, was so offensive that this court should reverse the convictions resulting from this use in the exercise of its supervisory power over the machinery of federal justice and law enforcement. Appellants find it particularly heinous that Hedges never told Kahn that he was no longer her client, and seek to show that the Government somehow abused the attorney-client privilege. However, the attorney-client privilege is not involved. That privilege is the client's, not the attorney's; and in any case, it does not extend to advice from the attorney in furtherance of a crime. McCormick, Evidence §96, §99 (1954). Nor is the use of Hedges in some other fashion offensive. As we have seen, he did not solicit bribes from Kahn; she came to him with offers of bribes and with veiled threats that he better not testify.

Kahn also urges upon us as grounds for reversal the alleged misconduct of an Assistant United States Attorney for the Southern District of New York. According to Kahn, Hedges admitted to this Assistant United States Attorney that he had been involved in the narcotics activity for which he had been convicted in Connecticut. This admission was made while Hedges was appealing from his Connecticut conviction, partly on the grounds of the insufficiency of the evidence against him. We fail to see how Hedges' right to challenge the sufficiency of the evidence against him was affected by his post-trial admission of guilt; or what the receipt of the post-trial admission, which apparently did not exculpate any of the codefendants, obliged the Assistant United States Attorney to do. In any event, the matter is entirely irrelevant to the present appeal.

5. *Rulings During the Course of Trial.*

Appellants contend that a variety of the rulings of the trial court were erroneous. Kahn argues that the attorney-client privilege was improperly invoked to prevent her from describing the legitimate objectives of her many visits to Hedges in prison, and that this restriction made it seem that she visited Hedges only for illicit purposes: suborning perjury or trying to prevent him from testifying. However, as the Government makes clear in its brief, Kahn herself suggested that she should not go into the nature of the topics discussed with Hedges. She hardly can object to a ruling she invited and did not object to when made.

Kahn and Schawartzberg contend that Hedges should not have been allowed to invoke his privilege against self-incrimination when questioned about the details of crimes, the commission of which he already had admitted. We do

not think it was reversible error to prevent defense exploration of the details of the crimes on cross-examination. Hedges may well have waived his privilege against self-incrimination by admitting commission of the crimes, but Kahn and Schawartzberg had already gotten most of the benefit they were going to get out of the crimes by virtue of Hedges' admission. His admission at once undermined his own credibility and indicated a legitimate lawyer-client reason for the many visits by Kahn to Hedges in prison. Exploration of the details of the crimes would have been largely superfluous. See *United States* v. *Irwin,* 354 F. 2d 192, 198 (2d Cir. 1965); *United States* v. *Owens,* 263 F. 2d 720, 722 (2d Cir. 1959).

Appellants also contend that the court should not have permitted the jury to be present when the Jencks Act material was being marked for identification. Perhaps it would be better had the identification of the Jencks Act material been done in the absence of the jury, see *Johnson* v. *United States,* 347 F. 2d 803, 806 (D. C. Cir. 1965); but this taken by itself is not sufficient grounds for reversal. See *Roberson* v. *United States,* 282 F. 2d 648, 650-51 (6th Cir.), *cert. denied,* 364 U. S. 879 (1960).

6. *Conclusion.*

We have carefully considered each of the remaining assignments of error put forward by the appellants, and find them devoid of merit. The convictions are accordingly affirmed.

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of July one thousand nine hundred and sixty-six.

Present:

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

FRANCES KAHN, and ISRAEL SCHWARTZBERG,
and VINCENT PACELLI,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX C

Order Denying Petition for Rehearing *En Banc*

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of August, one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

FRANCES KAHN, and ISRAEL SCHAWARTZBERG,
Defendants-Appellants.

Appendix C

A petition for a rehearing in banc having been filed herein by counsel for the appellants pro se,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX D

Constitutional Provisions Involved

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Ninth amendment of the Constitution of the United States provides:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

APPENDIX E

Statutes Involved

Title 18, U.S.C.A. §2 provides:

Principals

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

Title 18, U.S.C.A. §371 provides:

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Title 18, U.S.C.A. §401 provides:

A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

Title 18, U.S.C.A. §1503 provides:

Influencing or injuring officer, juror or witness generally

Whoever, corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official

duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769.

Title 18, U.S.C.A. §1622 provides:

Subornation of perjury

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 774.

Title 18, U.S.C.A. §3500 provides:

Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject

matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the

trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub.L. 85-269, Sept. 2, 1957, 71 Stat. 595.

§738, Code of Criminal Procedure, New York State provides:

Eavesdropping

A person:

1. not a sender or receiver of a telephone or telegraph communication who wilfully and by means of instrument overhears or records a telephone or telegraph communication, or who aids, authorizes, employs, procures or permits another to so do, without the consent of either a sender or receiver thereof; or

2. not present during a conversation or discussion who wilfully and by means of instrument overhears or records such conversation or discussion, or who aids, authorizes,

employs, procures or permits another to so do, without the consent of a party to such conversation or discussion; or

3. who, not a member of a jury, records or listens to by means of instrument the deliberations of such jury or who aids, authorizes, employs, procures or permits another to so do; is guilty of eavesdropping.

§739, Code of Criminal Procedure, New York State provides:

Exemption

There shall be exempt from the provisions of this article:

1. eavesdropping pursuant to an ex parte order granted pursuant to section eight hundred thirteen-a of the code of criminal procedure;

2. eavesdropping, as described in subdivision two of section seven hundred thirty-eight of this article, by a law enforcement officer pursuant to section eight hundred thirteen-b of the code of criminal procedure without an ex parte order obtained pursuant to section eight hundred thirteen-a of said code;

3. the normal operation of a telephone or telegraph corporation; and

4. the normal use of the services and facilities furnished by such corporation pursuant to its tariffs.

Appendix E

§740, Code of Criminal Procedure, New York State provides:

Punishment for eavesdropping

A person who violates any subdivision of section seven hundred thirty-eight of this chapter shall be guilty of a felony punishable by imprisonment for not more than two years.

§813-a, Code of Criminal Procedure, New York State provides:

Ex parte order for eavesdropping

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhead or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time

specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L.1958, c. 676, eff. July 1, 1958.

APPENDIX F

Respective Orders of District Court Judges re Eavesdropping Tapes Reclarification

Re: United States v. Israel Schawartzberg
Ind. No. 65 Cr. 999

Nunc pro tunc as of January 6, 1966, 2:45 P.M., the parties were directed that the reclarification of the tapes will commence on January 11, 1966, at 10:30 A.M., at Manhattan Sound Corp., 420 West 56th Street, New York City, and continue thereafter without interruption until completed, from 10:30 A.M. to 4:30 P.M. each day.

During the reclarification, petitioner Israel Schawartzberg may have an expert present but the reclarification process shall proceed as above directed regardless of the presence of said expert.

Petitioner personally may not attend at the reclarification process. Agent Thomas J. Dugan of the Federal Bureau of Narcotics may not attend at the reclarification process.

The foregoing directions, made as aforesaid, are deemed dispositive of this motion, and it is so ordered. No further order is necessary.

/s/ SIDNEY SUGARMAN
U.S.D.J.

Dated: New York, New York
January 10, 1966

[File endorsement omitted.]

The within motion to impound the tapes is denied, except that the defendant is permitted to have an expert present during the reclarification process.

So ordered.

(12/27/65)

/s/ CHARLES H. TENNEY

APPENDIX G

Order Denying Application to Cite Government For Contempt

February 3, 1966

The moving papers and the affidavit of Erwin Damsky, sworn to January 25, 1966, fail to disclose any disobedience by Howard L. Jacobs, William M. Tendy, Thomas J. Dugan or Norris Durham, of any order of Judge Tenney or Judge Sugarman, or of any misrepresentation by Howard L. Jacobs to Judge Sugarman.

Accordingly, the motion by defendant Schawartzberg "for an order citing" the said Jacobs, Tendy, Dugan and Durham "for Contempt of Court and for Obstructing Justice" is in all respects denied.

The said affidavit of Damsky will be forthwith referred to Judge McLean in connection with a motion by the government for further reclarification of the tapes, now pending before him.

It is so ordered. No further order is necessary.

/s/ SIDNEY SUGARMAN
U.S.D.J.

APPENDIX H

Notice of Motion for Speedy Trial, etc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

M-11-188

In the Matter of the Application for an Order Dismissing the Indictment for Want of Prosecution, or to Forthwith Arrest Movant ISRAEL SCHAWARTZBERG,

—against—

UNITED STATES OF AMERICA,

Respondent.

SIRS:

ISRAEL SCHAWARTZBERG, movant herein, duly sworn to the 1st day of November, 1965, and upon the Exhibits attached hereto in support thereof, the undersigned will move this Court at the United States Courthouse, Room 318, thereof, on the 8th day of November, 1965, at 10:30 A.M., for an Order directing the Government to dismiss the indictment heretofore found against movant, for want of prosecution and/or for unnecessary delay in arresting him and bringing him to trial, pursuant to Rules 47, 48 and 48(b) of the Federal Rules of Criminal Procedure, and the undersigned further moves for such other, further and different relief as may be just and proper in the interest of substantial justice.

Appendix H

Dated: November 1st, 1965
Bronx, New York City

Yours, etc.,

ISRAEL SCHAWARTZBERG
Movant Pro Se
Post Office Address
157 Field Place
Bronx, New York City, 10468

To:

HON. ROBERT M. MORGENTHAU
United States Attorney for the
Southern District of New York
Respondent
United States Courthouse
Foley Square, New York, 10007

Clerk of above Court

APPENDIX I

Notice of Motion for Speedy Trial, etc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Misc. No. 18-65

UNITED STATES OF AMERICA,

Plaintiffs,

—against—

ISRAEL SCHWARTZBERG,

Defendant.

HONORABLE SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of ISRAEL SCHAWARTZBERG, defendant herein, and upon the Complaint currently pending against said defendant in the above captioned matter, the said defendant will move this Court for an Order directing the attorneys for the Government to either dismiss the Complaint for lack of prosecution or to move this cause for a speedy indictment in order to afford defendant a speedy trial, pursuant to the Rules of the Federal Rules of Criminal Procedure; and the defendant will move for such; other, further and different relief as may be just and proper, on the 14 day of October, 1963, in Room 318, United States Courthouse, Foley Square, New York, on the opening of Court on said day or as soon thereafter as can be heard.

Appendix I

Dated: October 1st, 1963.
New York City, N. Y.

Yours, etc.,

ISRAEL SCHWARTZBERG
Defendant pro se
157 Field Place
Bronx 68, N. Y.

To:

HON. ROBERT M. MORGENTHAU
United States Attorney
Southern District of New York
Foley Square 7, New York

CLERK OF ABOVE COURT

APPENDIX J

Affidavit of Defense Electronic Expert Erwin Damsky in Support of Motion to Cite Prosecutors & Agents

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[SAME TITLES]

SUPPORTING AFFIDAVIT

STATE OF NEW YORK,
COUNTY OF KINGS, *ss.:*

ERWIN DAMSKY, being duly sworn, deposes and says:

That I am the sound expert who was employed by the above named defendant to attend the reclarification process in compliance with the respective orders made by Judge SIDNEY SUGARMAN on January 6th and 10, 1966, by Judge CHARLES H. TENNEY on December 27th and 29th, 1965.

I did attend the reclarification process on January 11th, 1966, at which time Federal Bureau of Narcotics Agent NORRIS DURHAM was also present at the processing were three employees of Manhattan Sound Corp.

The processing commenced at about 10:20 and was concluded at about 6 P.M. on January 11th, 1966. The agreed procedure was for me to make copies of the Government's eavesdropping tapes between counselor FRANCES KAHN and her client CHARLES HEDGES. Then the Government was to make copies of said tapes simultaneously with the improvement of the clarity of sound. Then I was to make a copy of the reclarified tapes after the Government concluded their experiment. All this was done. Federal Agent

Appendix J

The Sealing Process

Norris Durham and I both agreed to simply *mark for identification* all boxes containing the three sets of tapes so as not to mix up the defense and Government tapes. While signatures and string appear on the respective boxes of tapes belonging to the Government and to the defense, these boxes of tapes were *not sealed.* Government Agent Durham and I placed all the boxes of tapes, consisting of three (3) bundles, in *one master carton* with string tied to it and this string was covered with three-inch sealing gummed tape across which was written the initials of both the Agent and myself. The Federal Agent and I agreed that this method of sealing the master carton was the sole and safest way to insure the non-tampering of the tapes while I am not present.

I have just been informed by the defendant, Israel Schawartzberg, that prosecutor Howard L. Jacobs broke the seal on the master carton and listened to the Government's tapes. This action, in my absence, is contrary to Federal Agent Durham's and my express agreement and the tapes are, in my opinion, now so tainted as to make it impossible for me to attend any other reclarification process because it is now possible that the tapes were altered, edited and tampered with in my absence and without giving notice to my employer, Israel Schawartzberg, and I. I will be glad to appear at a hearing if this honorable Court so desires.

Sworn to the 25th day of January, 1966.

/s/ Erwin Damsky

(Duly verified.)